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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

In re NATHAN R. et al., Persons
Coming Under the Juvenile
Court Law.

B295035

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN
AND FAMILY SERVICES,

Los Angeles County
Super. Ct. No. CK44327

Plaintiff and Respondent,

v.

JENNIFER A.,

Defendant and Appellant.

APPEAL from orders of the Superior Court of Los Angeles
County, Kristen Byrdsong, Juvenile Court Referee. Affirmed.

Jamie A. Moran, under appointment by the Court of
Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, Kristine P. Miles,
Assistant County Counsel, and Jessica S. Mitchell, Deputy
County Counsel, for Plaintiff and Respondent.

INTRODUCTION

Jennifer A. (mother) appeals from the juvenile court's orders denying her petition under Welfare and Institutions Code¹ section 388, terminating her parental rights under section 366.26, and selecting adoption as the permanent plan for her five-year-old son, Nathan R., and her three-year-old son, Leonard R. Mother challenges only the order denying her section 388 petition, which sought an order placing the children in her home or, in the alternative, reinstating her reunification services, based on the fact she began to address her long-term issues with substance abuse. Mother does not challenge the orders terminating her parental rights or selecting adoption as the permanent plan. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. The Family's History and Initiation of Dependency Proceedings

Mother and Leonard R. (father) are Nathan's and Leonard's parents.² Mother and father each have a nearly two-decade long history of substance abuse. Prior to this case, mother's parental rights were terminated as to three of Nathan's and Leonard's brothers and mother's daughter was placed in a legal guardianship because of mother's issues with substance abuse. Mother and father each completed drug and alcohol treatment programs in the past, but they both relapsed before this case was initiated.

¹ All undesignated statutory references are to the Welfare and Institutions Code.

² Father is not a party to this appeal.

Before Nathan and Leonard came to the attention of the Department of Children and Family Services (Department), mother and father were separated. Father and Nathan were living with the children's paternal grandmother, and mother and Leonard were living in a transitional housing program. Around May or June 2016, mother moved out of the housing program because she could not abide by its strict rules. After leaving the program, mother brought Leonard to live with father.

On July 5, 2016, the Department received a referral that the children were at risk of harm because mother was homeless and both parents were using drugs. The Department visited father's house to check on the children. Father and the paternal grandmother denied that father recently used any drugs, but father told the Department he occasionally drinks beer. Father believed mother was homeless and did not know where she was living. After agreeing to submit to a drug test, father tested positive for methamphetamines.

The Department removed the children from father's home and placed them with a non-relative family member (caregiver). After being removed from father's custody, Nathan and Leonard underwent medical examinations, which revealed they both suffered from fetal alcohol syndrome. Nathan also displayed developmental issues, including delayed speech, "self regulation, and emotional control."

In late July 2016, the Department filed a dependency petition on the children's behalf, which, as later sustained by the court, alleged that mother and father each had a 17-year history of substance abuse, and that father recently tested positive for methamphetamines, all of which rendered the parents incapable of providing the children regular care and supervision (b-1, b-2, j-

1, and j-2 allegations).³ The court ordered the children detained from their parents' custody and awarded mother and father monitored visitation.

2. Jurisdiction and Disposition

As of September 2016, father submitted one clean drug test sample, and he was participating in a parenting, relapse prevention, and substance-abuse program. Mother and father were visiting the children regularly, and the caregiver reported that both parents displayed appropriate behavior during their visits.

Mother had her first in-person interview with the Department's social worker in late September 2016. Mother was late to the meeting, carrying an open can of beer. Mother told the social worker she "didn't know anything" about the children's petition, but that she recently made an intake appointment with the Los Angeles Centers for Alcohol and Drug Abuse (L.A. CADA). Around mid-October, the social worker contacted a representative at L.A. CADA, who reported that mother had yet to enroll in any treatment program.

As of December 2016, father was progressing with his drug treatment, while mother continued to stall. Mother had yet to submit to any drug tests, she had not enrolled in any drug counseling or treatment programs, and she had missed several visits with the children. Father was making good progress in his program—having submitted 35 clean drug tests since enrolling—even though he occasionally missed some sessions.

³ The court dismissed three allegations that alleged the parents' history of domestic violence placed the children at risk of substantial harm (a-1, b-3, and j-3 allegations).

The court held the jurisdiction and disposition hearing in late December 2016. After mother and father pled no contest to the children's petition, the court sustained the b-1, b-2, j-1, and j-2 allegations, and it dismissed the a-1, b-3, and j-3 allegations. The court declared Nathan and Leonard dependent children and ordered them removed from their parents' custody. The court awarded mother and father reunification services and ordered them to participate in full drug and alcohol treatment programs, including aftercare and random drug testing, and to attend individual counseling and parenting classes. Mother was awarded monitored visits, and father was awarded unmonitored visits, with the children.

3. The Reunification Period

For the first couple of months after the jurisdiction and disposition hearing, father complied with his case plan. He was participating in an outpatient treatment program and attending a 12-step program. Father was discharged from his treatment program in February 2017, however, after he missed several drug tests and one-on-one sessions. Although father re-enrolled in the program in March, he admitted that he relapsed in late April. Even after re-enrolling in his drug treatment program, father continued to miss drug tests, and he had not enrolled in individual counseling with a licensed therapist. Because father was not in compliance with his case plan, his visits reverted to being monitored. The caregiver reported that father's visits continued to be "very appropriate."

Mother enrolled in L.A. CADA's treatment program in mid-November 2016, but she did not start attending the program until late December 2016, after the jurisdiction and disposition hearing. In early January 2017, mother tested positive for

methamphetamine, and she was discharged from L.A. CADA in February 2017 for violating the program's attendance policy.

In May 2017, mother met in person with one of the Department's social workers. Mother admitted she used methamphetamine earlier that morning and that she was still under the influence at the time of the meeting. Mother began attending L.A. CADA again in mid-May 2017, but she had not drug tested after her first eight sessions because she continued to use drugs. Although mother visited the children at least once a month, the visits usually lasted only 20 minutes.

In September 2017, the Department reported that Nathan and Leonard were very attached to their caregiver, who wanted to adopt them. Father completed a six-month outpatient treatment program, and he was set to begin a four-week aftercare program. All of father's drug tests between March and September 2017 were clean. The Department had "no current information" on mother's progress with her case plan because she had not shown up for any of her scheduled interviews.

The court held a review hearing in October 2017. The court found father was in partial compliance with his case plan and continued his reunification services. After finding mother did not comply with her case plan, the court terminated her reunification services.

As of late January 2018, father's attendance at the scheduled visits was sporadic. Leonard reported to his teacher that father was drinking during visits and showing up to some visits drunk. Father was apparently so drunk during one visit that he vomited in front of Leonard. According to the Department-approved monitor, father "was sweating profusely with sweat dripping from his face" during one visit, even though

it was cold outside. Father often appeared “uncomfortable and unaware of how to engage with the children,” and the children did not listen to him and “did their own thing ignoring his commands.” Mother told the children’s caregiver that father “cleans his system” before he drug trusts, and that he won’t test if he believes the test will be positive.

In March 2018, the court held a second review hearing. The court found father was not complying with his case plan, terminated his reunification services, and scheduled a selection and implementation hearing under section 366.26.

4. Mother’s Section 388 Petition and the Termination of Parental Rights

In July 2018, the Department reported that Nathan and Leonard were thriving in their caregiver’s home. Since being placed with the caregiver, both children showed significant improvement in their health and development. The caregiver wanted to adopt the children, but she was open to allowing mother and father to have monitored contact with the children, so long as the parents were not under the influence of drugs or alcohol.

Father’s visits with the children remained inconsistent. Since April 2018, he visited the children five times, but he cancelled or missed four visits. In May 2018, mother contacted the Department about arranging visits with the children, but she never followed up to schedule any visits.

In late September 2018, mother enrolled in a drug treatment program at L.A. CADA. Mother was participating in the program four and a half hours a week, and she was also attending weekly therapy sessions “to address issues with substance abuse and past trauma.”

Between October and December 2018, mother visited Nathan and Leonard four times. According to the children's caregiver, mother became "‘easier to work with now that she is sober.’" Mother and Leonard got along well during visits, but Nathan did not appear to have a bond with mother. The caregiver reported that although she would encourage Nathan to interact and spend time with mother during visits, he refused to do so. Mother regularly tried calling Nathan and Leonard, but the boys usually didn't want to talk to her. When asked about his visits and conversations with mother, Nathan told one of the Department's social workers that he "[didn't] know" if he enjoyed his last visit with mother and that he doesn't want to talk to her when she calls.

In December 2018, mother filed a petition under section 388, asking the court to grant her custody of the children or, at the very least, reinstate her reunification services. Mother claimed she achieved a change in circumstances by participating in an outpatient treatment program with parenting classes and individual counseling through L.A. CADA, submitting several clean drug test samples, and regularly visiting the children. Mother claimed it would be in Nathan's and Leonard's best interests to grant the petition because the children would be able to have an ongoing "relationship and bond" with her, and she was "committed to her sobriety and to reunifying with her child[ren]."

In support of her section 388 petition, mother submitted a letter from a L.A. CADA official, dated November 5, 2018, confirming mother enrolled in the drug treatment program. Since enrolling, mother submitted five clean drug tests. The L.A. CADA official believed that mother was benefiting from the program,

and she encouraged mother to continue participating and to obtain a sponsor.

The Department filed its response to mother's section 388 petition in January 2019. According to the Department, Nathan and Leonard were well-bonded to their caregiver, and they called her "mommy." When asked whether he would like to live with mother or the caregiver, Nathan chose the caregiver.

On January 9, 2019, the court heard mother's section 388 petition. Mother testified she completed three months of the L.A. CADA outpatient program, and she had another three months to go. Mother was living with her aunt, who was willing to take custody of the children. Mother intended to move into the Salvation Army's transitional housing program once she completed the L.A. CADA program. Mother recognized she's had long-term problems with drug abuse and that she will always be an "addict," but she claimed she was "extremely" committed to achieving sobriety and believed she could remain clean if she finished her outpatient program. Mother acknowledged, however, that she completed other outpatient treatment programs in the past before her relapse that led to Nathan's and Leonard's current case.

The court denied mother's section 388 petition. The court commended mother "on her dedication to her sobriety and hard work," but found that mother's circumstances were only "changing, not changed." The court also found it would not be in Nathan's and Leonard's best interests to grant mother's petition because the children had been out of mother's care for two years and "formed a bond with their caregiver whom they viewed as their parent[.]"

After denying mother's petition, the court conducted the selection and implementation hearing. The court found the parent-child beneficial relationship exception did not apply, terminated mother's and father's parental rights, and set adoption as Nathan's and Leonard's permanent plans. Mother timely appeals.

DISCUSSION

Under section 388, a parent may petition the juvenile court to change, modify, or set aside a prior order based on changed circumstances or new evidence. (§ 388, subd. (a)(1).) To warrant modifying a juvenile court's order under section 388, the parent must show there has been "a substantial change in circumstances regarding the child's welfare and the requested modification of the prior order [would] be in the child's best interests." (*In re Heraclio A.* (1996) 42 Cal.App.4th 569, 577.) Once reunification services have been terminated, "it is presumed that continued out-of-home care is in the child's best interests." (*In re Alayah J.* (2017) 9 Cal.App.5th 469, 478.)

It is not sufficient to show that circumstances are merely "changing" or that the parent has only begun to take steps toward addressing the problems that led to dependency. (*In re C.J.W.* (2007) 157 Cal.App.4th 1075, 1081.) To determine whether the proposed change would be in a child's best interests, courts look to three factors: (1) the seriousness of the problem leading to the child's dependency and the reason for its continuation; (2) the relative strength of the bonds between the child and both her biological parent and her caretaker, as well as the relative lengths of time the child has spent with her biological parent and her caretaker; and (3) the nature of the change of circumstance, the ease by which the change could be brought

about, and the reason the change was not made earlier. (*In re Amber M.* (2002) 103 Cal.App.4th 681, 685 (*Amber M.*), citing *In re Kimberly F.* (1997) 56 Cal.App.4th 519, 530–532.)

We review a juvenile court’s decision to deny a petition for modification without an evidentiary hearing for an abuse of discretion. (*Amber M.*, *supra*, 103 Cal.App.4th at pp. 685–686.) “The denial of a section 388 motion rarely merits reversal as an abuse of discretion.” (*Ibid.*)

Mother contends she presented sufficient evidence to demonstrate a change in circumstances concerning her issues with substance abuse. Specifically, mother asserts her completion of three months of an outpatient treatment program, submission of five clean drug test samples, and her intention to participate in three additional months of her treatment program and eventually move into a transitional housing program were sufficient to warrant placing Nathan and Leonard back in her custody or, at the very least, reinstating her reunification services. While mother’s evidence shows she made some sustained progress in treating her issues with addiction and substance abuse, it was not sufficient to establish a substantial change that would warrant delaying Nathan’s and Leonard’s adoption into a stable and nurturing home.

Mother has a nearly 20-year history of substance abuse that has resulted in four of her other children being adopted or placed in a legal guardianship, and those same issues led to Nathan and Leonard becoming dependents of the court in this case. Throughout most of this case, mother continued to use drugs and was inconsistent, at best, in her efforts to address her substance abuse issues. Mother waited until more than a year after her reunification services were terminated, and almost two

years after the court first declared Nathan and Leonard dependents of the court, to take any meaningful steps toward resolving the issues that led to the children's dependency proceedings. While it is commendable that mother appears determined to remain drug free, she needed to make much more progress in resolving her issues with substance abuse than she did before filing her section 388 petition, especially considering her history of relapse following her completion of treatment programs in the past. (See *Amber M.*, *supra*, 103 Cal.App.4th at pp. 686–687 [court properly denied section 388 petition where mother with 17-year history of substance abuse, and who had relapsed during the children's case, completed the residential portion of her substance abuse program and several steps of a "12-step program"].)

There is also ample evidence that it would not have been in Nathan's and Leonard's best interests to grant mother's section 388 petition. One of the most important considerations in evaluating a child's best interests is the goal of ensuring stability and continuity. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.) That is especially true once a parent's reunification services have been terminated. At that point, the parent's interest in the care, custody, and companionship of the child is no longer paramount, and the focus shifts to the needs of the child for permanency and stability. (*Ibid.*; *In re Marilyn H.* (1993) 5 Cal.4th 295, 307, 309.) After a parent's reunification services have been terminated, a rebuttable presumption arises that adoption is in the child's best interest. (*Marilyn H.*, at p. 309; *In re Angel B.* (2002) 97 Cal.App.4th 454, 464.)

At the time mother filed her section 388 petition, her reunification services had been terminated for over a year, and

Nathan and Leonard had been living with their caregiver for more than two years, or for most of both children's lives. Nathan and Leonard considered the caregiver to be their mother, and neither child shared a strong bond with mother. Indeed, Nathan told the Department he would rather continue living with the caregiver than return to mother's custody. Additionally, while there was evidence that Leonard enjoyed his visits with mother, Nathan often refused to engage with her during in-person visits, and neither child liked talking to her on the phone.

More importantly, the caregiver has provided the children the stability and care they never received from mother or father. After they were initially detained from their parents' custody, Nathan and Leonard were both diagnosed with fetal alcohol syndrome, which was caused by mother's use of substances while she was pregnant with them. Nathan also displayed developmental delays associated with mother's use of substances during her pregnancy. After they were placed with the caregiver, however, Nathan and Leonard began receiving proper medical care and were showing significant signs of improvement in their physical and mental development. At no point during the children's proceedings did mother demonstrate that she would be able to provide Nathan and Leonard a home environment nearly as stable and nurturing as the one they have found with their caregiver.

In sum, the court did not abuse its discretion in finding mother failed to establish a significant change in circumstances or finding that it would not be in Nathan's and Leonard's best interests to return the children to mother's custody or to reinstate her reunification services.

DISPOSITION

The court's January 9, 2019 orders denying mother's section 388 petition, terminating mother's parental rights, and setting adoption as the permanent plan are affirmed.

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LAVIN, Acting, P.J.

WE CONCUR:

EGERTON, J.

DHANIDINA, J.